

KU LEUVEN

CENTRE FOR IT & IP LAW



Moral rights: an indispensable part of a EU unitary Copyright

Prof. Marie-Christine Janssens
KU Leuven Centre for IT & IP Law
Member European Copyright Society

ECS Conference: Building a EU unitary copyright -
Science Po Paris – 12 may 2017



R 9 InfoSoc D. 2001 : The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention ... Such moral rights remain outside the scope of this Directive

“C’est quand même gênant d’imaginer une harmonisation des droits d’auteurs qui n’aborde pas, la question du droit moral, parce que, à force de ne plus en parler (et notamment dans les documents de l’Union européenne), on finit par s’imaginer qu’il n’existe plus” (André Lucas)

“Issue is too sensitive”



Clash between the two copyright traditions

Same problem for economic rights

‘Let’s stop talking about it and focus on the real differences (i.e. also amongst continental countries

Strongly deviating interest of interested parties

Same problem for economic rights

Lack of competence / no negative impact on smooth running of internal market

Outdated & art. 118 TFEU

True – some particular problems

Inalienable character (not for economic rights)

- However Berne does not expressly exclude waivers

Not highly litigious area

- Yes, but extreme legal uncertainty as to applications online

Lack empirical & economic data on effect DSM



Harmonisation – a fortiori unification – cannot exclude moral rights

1.

- Increased **relevance** in Information society

2.

- Internal market objective must avoid **fragmentation** into **submarkets** characterized by different standards

3.

- Building a copyright acquis excluding moral rights is **artificial** and leads to **contradictions**

4.

- Moral rights are a **key element of a holistic copyright framework**

5.

- Moral rights have been included in acquis on **enforcement** of copyright (see art. 2 & Liffers case C-99/15)

1. Increased relevance of moral rights in digital age



- ❑ How to design harmonized solutions for economic rights re: transformative uses, UGC, participative web context, ...without involving moral rights ?
 - MR place restrictions on these types of use !

3. Building a copyright acquis isolating moral rights is artificial and leads to contradictions

Interplay with exclusive rights

- Right to divulgate & right of first exploitation (reproduction and/or communication to the public)
- Right of adaptation : no harmonization yet ; but is it possible without moral rights?

Interplay with exceptions (art. 5)

- Art 5.3.a, c, d & f : cater for right of attribution (indication of source)
- Quotation right: caters for right of divulation
- All are subject to interpretation by CJEU (that should be blind for moral rights issues ... ?)
- Parody inherently affects moral rights – allowed to what extent ? (see next slide)



Deckmyn : How could CJEU arrive at sound decision & even conclude to an autonomous EU law concept for parody if one of the important parameters to assess its scope is excluded from such law ?

4. Moral rights are a key element of a holistic copyright framework

A single
copyright
title without
moral right
is
nonsense

- Cf. International law: copyright encompasses both economic and moral rights
- Art. 118 TFEU does not outlaw moral rights



No partial
harmonization yet !
Fully embrace the
subject matter →
Consistent
legislation

Possible avenues

❑ Starting point : Wittem Code

❑ Nuts to crack – finding common standards

- **Term** of protection
- **Scope** of each moral right (esp. right of integrity)
- **Building in flexibility**
 - Differentiated treatment
 - Waivability - Total inalienability is no longer tenable

Term of protection

- Remember discussion over Term directive & constitutional guarantees !
- See original proposal Term Directive with echo of Art. 6bis!
- Equal duration of economic and moral rights is majority approach
- Yet, necessity to adapt to current digital environment might warrant new approaches
 - Shorter term for some rights (e.g. divulgation)
 - And/or restrictive modalities as regards exercise after death of author

Scope of the rights

Right of divulgation: not too difficult

- Warranted to leave author in control (at least once) given the erosion of moral interests esp. in the digital environment

Right of attribution (Bern standard)

- Already implicitly included in *acquis*
- Not in a too rigid manner: see *infra* 'flexibility'

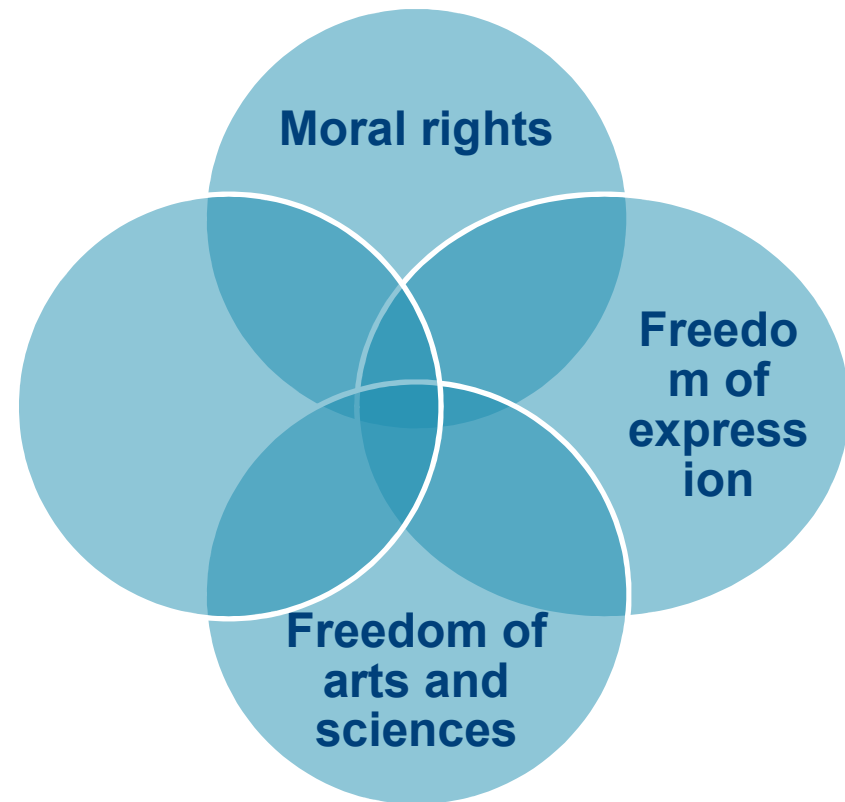
Right of integrity – biggest challenge?

- Significant national disparities
 - Objective or subjective norm
 - Build-in mechanism of abuse of rights (necessary for legal certainty)

CJEU Sabam/Scarlet 2011

□ Copyright is not absolute

- *“There is . . . nothing whatsoever in the wording of [the Fundamental Rights Charter] or in the Court's case-law to suggest that (an IP) right is inviolable and must for that reason be absolutely protected”*
- Hence, also for moral rights !



Allowing flexibility

- ❑ **Differentiated treatment** (cf. exceptions to economic rights)
 - ❑ Concerning certain works
 - ❑ e.g. software, ...
 - ❑ Right of integrity as regards design of a coffee machine is laughable (Corbet)
 - ❑ Concerning certain use
 - ❑ User-Generated-Content, remixes, other transformative uses
- ❑ **Waivability** (total inalienability is no longer tenable)
 - Not explicitly prohibited by Bern
 - Reality of open-license systems, collaborative creations

Wittem Code - Chap. III: Moral Rights

□ Art. 3.1 – General :

- The moral rights in a work are the rights of divulgation, attribution and integrity, as provided for in articles 3.2, 3.3 and 3.4.

□ Art. 3.2. – Right of divulgation

- (1) The right of divulgation is the right to decide whether, and how the work is disclosed for the first time.
- (2) This right shall last for the life of the author.

□ Art. 3.3. – Right of attribution

- (1) The right of attribution comprises:
 - a. the right to be identified as the author, including the right to choose the manner of identification, and the right, if the author so decides, to remain unidentified.
 - b. the right to require that the name or title which the author has given to the work be indicated.
- (2) This right shall last for the life of the author and until [...] years after his death. The legal successor as defined by the laws on inheritance is entitled to exercise the rights after the death of the author

Wittem Code - Chap. III: Moral Rights

□ Art. 3.4 – Right of integrity

(1) The right of integrity is the right to object to any distortion, mutilation or other modification, or other derogatory action in relation to the work, which would be prejudicial to the honour or reputation of the author.

(2) This right shall last for the life of the author and until [...] years after his death. The legal successor as defined by the laws on inheritance shall be entitled to exercise the right after the death of the author.

□ Art. 3.5 – Consent

The author can consent not to exercise his moral rights. Such consent must be limited in scope, unequivocal and informed.

Wittem Code - Chap. III: Moral Rights

□ Art. 3.6 – Interests of third parties

- (1) The moral rights recognised in article 3.1 will not be enforced in situations where to do so would harm the legitimate interests of third parties to an extent which is manifestly disproportionate to the interests of the author.
- (2) After the author's death, the moral rights of attribution and integrity shall only be exercised in a manner that takes into account the interests in protecting the person of the deceased author, as well as the legitimate interests of third parties